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Comment

Central States v. Personnel, Inc.: When Real Estate Investments Create Personal Liability Under the Multiemployer Pension Plan Amendments Act of 1980

Susan C. Glen

When intense competition forced Eugene Perrelle to close the doors of his truck driver leasing company, Personnel, Inc. ("Personnel"), the corporation incurred a "withdrawal liability"¹ of almost \$300,000 for its share of the unfunded vested liabilities² of the local Teamsters' pension plan.³ Pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"),⁴ as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"),⁵ withdrawal liability attaches not only to

1. Withdrawal liability, a creation of the Multiemployer Pension Plan Amendments Act ("MPPAA"), is the amount an employer that participates in a multiemployer pension plan must pay upon completely or partially withdrawing from the plan. See 29 U.S.C. §§ 1381-1385 (1988). An employer may withdraw from a plan by ceasing or decreasing contributions to the plan. See *infra* note 24.

2. Federal law defines vested liabilities as "the present value of the immediate or deferred benefits available at normal retirement age for participants and their beneficiaries which are nonforfeitable." 29 U.S.C. § 1002(25) (1988). A plan is underfunded for vested benefits if, on an actuarial basis, the value of vested benefits exceeds the value of the plan's assets. U.S. COMPTROLLER GENERAL, REPORT TO THE CONGRESS, EFFECTS OF LIABILITIES ASSESSED EMPLOYERS WITHDRAWING FROM MULTIEMPLOYER PENSION PLANS 1 n.2 (March 14, 1985) [hereinafter GAO REPORT].

3. *Central States, Southeast & Southwest Pension Fund v. Personnel, Inc.*, 974 F.2d 789, 791 (7th Cir. 1992). ERISA defines a "pension plan" as "any plan, fund, or program . . . established or maintained by an employer or by an employee organization, or by both . . . [that] provides retirement income to employees, or results in a deferral of income by employees for periods extending to the termination of covered employment or beyond." 29 U.S.C. § 1002(2)(A) (1988).

4. Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001-1461 and in scattered sections of titles 5, 18, 26, 31, and 42 U.S.C.).

5. Pub. L. No. 96-364, 94 Stat. 1208 (codified as amended in scattered sections of titles 26 and 29 U.S.C.). The citations in this Comment refer to sections

the participating employer, but also jointly and severally to all "trades or businesses" under "common control."⁶ According to the Seventh Circuit, Perrelle operated two distinct businesses under common control. Perrelle undeniably owned all of Personnel's stock.⁷ The Seventh Circuit declared that Perrelle also acted as a sole proprietor of a real estate business because he owned and leased an apartment building at the time Personnel withdrew from the pension plan and because he had sold and leased properties over the previous three years.⁸ Thus, under MPPAA's controlled group provisions, Perrelle's sole proprietorship became jointly and severally liable, and Perrelle became personally liable for Personnel's withdrawal obligation.⁹

As the Pension Benefit Guaranty Corporation's potential liability increases,¹⁰ pension plan administrators will attempt to protect workers by continuing to press for the broadest possible interpretation of MPPAA's withdrawal liability provisions. The Seventh Circuit's overly expansive interpretation of the term "trades or businesses" in *Central States v. Personnel, Inc.*,¹¹ which encompasses personal investments like Perrelle's real estate activities, imposes an unexpected and unwarranted penalty on individual employers of unionized labor.

This Comment addresses the extent to which MPPAA holds owners of controlling interests in corporations personally liable for their corporations' pension plan withdrawal obligations because they also maintain personal investments. Part I discusses the problem of multiemployer pension plan underfunding, the operation of withdrawal liability, and MPPAA's controlled group provisions. Part II describes the *Personnel* decisions. Part III analyzes under what circumstances MPPAA should deem ownership of real estate or other assets "trades or businesses" for purposes of imposing withdrawal liability.

This Comment concludes that courts must better distinguish trades or businesses from assets, like Perrelle's real es-

of the United States Code rather than to the internal numbering of ERISA and MPPAA.

6. 29 U.S.C. § 1301(b)(1) (1988); *Pension Benefit Guar. Corp. v. Ouimet*, 630 F.2d 4, 11 (1st Cir. 1980), *cert. denied*, 450 U.S. 914 (1981); see 26 C.F.R. § 1.414(c)-2 (1992) (defining "trades or businesses under common control").

7. *Personnel*, 974 F.2d at 791.

8. *Id.* at 794-96.

9. *Id.* at 795-96.

10. For an explanation of the Pension Benefit Guaranty Corporation's role, see *infra* note 16. For a discussion of the PBGC's massive deficit, see GAO REPORT, *infra* notes 30-34 and accompanying text.

11. 974 F.2d 789, 794-96 (7th Cir. 1992).

tate, held primarily as investments. A narrower interpretation of the term "trades or businesses" bolsters union workers' retirement security by eliminating a disincentive for employers to participate in multiemployer pension plans. It also enables employers to maintain some personal investments, outside of qualified plans, that are not subject to controlled group liability.

I. EMPLOYER LIABILITY FOR WITHDRAWAL FROM MULTIEMPLOYER PENSION PLANS

Congress enacted ERISA to safeguard the "continued well-being and security of millions of employees and their dependents" covered by private pension plans.¹² To accomplish this goal, ERISA revised the federal tax allowances¹³ for "qualified"¹⁴ pension plans and created the Pension Benefit Guaranty Corporation ("PBGC"),¹⁵ a wholly-owned government corporation within the Department of Labor, to insure those plans.¹⁶ The PBGC currently insures the pensions of about 40 million American workers.¹⁷

12. 29 U.S.C. § 1001 (1988) (entitled "Congressional findings and declaration of policy").

13. ERISA provides three main tax advantages: employer contributions usually cannot be included in an employee's gross income until they are distributed, employer contributions usually can be deducted when paid, and contributions are held in a trust, the earnings of which are tax exempt. 2 BORIS I. BITTKER & LAWRENCE LOKKEN, *FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS* ¶ 61.1.1, at 61-3 to 61-4 (2d ed. 1989).

14. A qualified pension plan meets the requirements of I.R.C. § 401(a) and the sections to which it refers. See I.R.C. § 401(a) (1988); BITTKER & LOKKEN, *supra* note 13, ¶ 61.2, at 61-16 to 61-17; see generally *id.* ¶ 61.1.2; WILLIAM L. SOLLEE & LARRY E. SHAPIRO, *PENSION PLANS—QUALIFICATIONS* (BNA Tax Mgmt. Portfolio No. 351, 1992). Despite the wide usage of the term "qualified plan," it is the trust formed to hold the pension plan, rather than the plan itself, that is qualified. BITTKER & LOKKEN, *supra* note 13, at ¶ 61.2, 61-16 to 61-17.

15. 29 U.S.C. §§ 1301-1309 (1988) (establishing the PBGC).

16. See 29 U.S.C. §§ 1301-1461 (1988). The PBGC insures vested retirement benefits for participants of covered plans that terminate with insufficient funds to pay vested benefits. See *id.* For a definition of unfunded vested benefits, see *supra* note 2. The Department of Labor enforces the funding provisions, fiduciary standards, and other requirements of ERISA's title I. The PBGC enforces funding obligations through its statutory power to terminate plans. Daniel Keating, *Chapter 11's New Ten-Ton Monster: The PBGC and Bankruptcy*, 77 MINN. L. REV. 803, 803 n.1 (1993) (citing Frank Cummings, *Labor Relations and ERISA: Considerations in Corporate Change (Mergers, Acquisitions, Bankruptcy)*, in ALI-ABA RESOURCE MATERIALS: LABOR AND EMPLOYMENT LAW 1787, 1812 (6th ed. 1992)).

17. David A. Vise, *Dueling Actuaries: Icahn, Regulators at Odds Over What He Owes to TWA's Retirement Funds*, MINNEAPOLIS STAR & TRIB., Oct. 28, 1992, at 1D.

Multiemployer pension plans include defined benefit and defined contribution plans¹⁸ maintained by two or more employers pursuant to collective bargaining agreements.¹⁹ Traditionally, employers have established these plans, organized by industry or region or both,²⁰ in industries for which single employer plans would be inadequate because of cyclical employment, repeated layoffs, or frequent business failures.²¹ The PBGC estimates that in 1987 it insured the benefits of 8.2 million workers participating in 2,300 multiemployer plans.²²

The PBGC may pay plan benefits of up to only \$2,352.27 per month (in 1992 dollars) per beneficiary even if the original pension plan promised higher payments to the beneficiary. Keating, *supra* note 16, at 807; see 29 U.S.C. § 1322 (1988). Even so, about 85% of plan participants receive all benefits promised after plan termination. Keating, *supra* note 16, at 807 (citing James B. Lockhart, *Securing the Pension Promise*, 43 LAB. L.J. 195, 195 (1992)).

18. Defined benefit plans, the type involved in *Personnel*, provide workers an annual pension, usually based on the employee's salary and years of service. Keating, *supra* note 16, at 805; see 29 U.S.C. § 1002(35) (1988). Most pension plans are defined benefit plans. Keating, *supra* note 16, at 805-06 (citing James G. Durfee, *ERISA Overview*, in PENSION AND WELFARE BENEFITS IN BANKRUPTCY 33, 37 (PLI Commercial Law & Practice Course Handbook Series No. 444, 1988)). Because defined benefit plans are funded over time, at any given time the plan may have insufficient assets to pay all vested benefits. FRANK CUMMINGS & ALICIA M. KERSHAW, *MULTIEMPLOYER PLANS—SPECIAL RULES*, at A-2 (BNA Tax Mgmt. Portfolio No. 359-2d, 1986).

In defined contribution plans, the employer contributes a percentage of an employee's income to an account, to which the employee is entitled upon retirement. Keating, *supra* note 16, at 806; see 29 U.S.C. § 1002(34) (1988).

19. 29 U.S.C. §§ 1002(37)(A), 1301(a)(3) (1988). ERISA defines single employer plans as all defined benefit plans which are not multiemployer plans. 29 U.S.C. § 1301(b)(2) (1988). For plan qualification purposes, all members of a controlled group of trades or businesses constitute one "employer." I.R.C. §§ 413, 414(b)-(c) (1988). Thus, a pension plan maintained by two commonly controlled businesses would not qualify as a multiemployer plan. See *id.*

20. CUMMINGS & KERSHAW, *supra* note 18, at A-1.

21. J. Robert Suffoletta, Jr., Note, *Who Should Pay When Federally Insured Pension Funds Go Broke?: A Strategy for Recovering from the Wrongdoers*, 65 NOTRE DAME L. REV. 308, 311 n.18 (1990) (citing *Multiemployer Pension Plan Amendments Act of 1979: Hearing Before the House Comm. on Ways & Means*, 96th Cong., 2d Sess. 72 (1980)) ("In industries of these kinds, workers cannot obtain meaningful pension rights under a single-employer plan. Thus, collectively bargained, multiemployer plans were developed to provide pensions to workers in these highly volatile industries.").

22. *Id.* at 311 n.18. (citing PENSION BENEFIT GUAR. CORP., ANN. REP. 5 (1987)).

A primary advantage of multiemployer plans is portability of benefits. CUMMINGS & KERSHAW, *supra* note 18, at A-1. That is, employees can take their benefits with them if they take jobs with other employers contributing to the same pension plan or with employers contributing to other plans with reciprocity agreements. *Id.*

A. TERMINATION LIABILITY AND PLAN UNDERFUNDING

As originally enacted, ERISA imposed a termination liability²³ of up to thirty percent of an employer's net worth on an employer that withdrew, in whole or in part,²⁴ from a multiemployer pension plan insured by the PBGC if that plan terminated within five years of the employer's withdrawal.²⁵ If the plan survived for five years or more, the withdrawing employer incurred no liability and the withdrawing employer's share of the plan's unfunded vested liability shifted to the employers still participating in the plan.²⁶ The shifting of a plan's unfunded liability decreased the contribution base for the plan,²⁷ thereby

23. Termination liability is the amount of a plan's unfunded vested benefits for which an employer is liable when the pension plan to which the employer had contributed terminates. The liability also includes interest, calculated at a reasonable rate, from the termination date. See 29 U.S.C. §§ 1361-1371 (1988). In MPPAA, Congress replaced termination liability with withdrawal liability for multiemployer plans. See *infra* notes 36-38 and accompanying text.

24. Withdrawal can be "complete" or "partial." 29 U.S.C. § 1381 (1988). A complete withdrawal occurs when an employer permanently ceases to have an obligation to contribute or permanently ceases covered operations (e.g., ceases to be signatory to a collective bargaining agreement or goes out of business). 29 U.S.C. § 1383 (1988). A partial withdrawal occurs when an employer effects a 70% contribution decline or experiences a partial cessation of its obligation to contribute. 29 U.S.C. § 1385 (1988). The usual partial withdrawal scenario occurs because an employer has suffered a 70% or greater decline in contribution base units (e.g., hours or tons) for three consecutive plan years. John R. Woodrum & Timothy B. McBride, *Controlled Group Liability Under the Multiemployer Pension Plan Amendments Act: Liability Without Limit?*, 90 W. VA. L. REV. 731, 731 n.3 (1988).

25. See *Pension Benefit Guar. Corp. v. R.A. Gray Co.*, 467 U.S. 717, 721 (1984).

26. See *id.*

27. See *id.* The Executive Director of the PBGC testified before Congress to the adverse effect of employer withdrawal on multiemployer plans:

A key problem of ongoing multiemployer plans, especially in declining industries, is the problem of employer withdrawal. Employer withdrawals reduce a plan's contribution base. This pushes the contribution rate for remaining employers to higher and higher levels in order to fund past service liabilities, including liabilities generated by employers no longer participating in the plan, so-called inherited liabilities. The rising costs may encourage—or force—further withdrawals, thereby increasing the inherited liabilities to be funded by an ever-decreasing contribution base. This vicious downward spiral may continue until it is no longer reasonable or possible for the pension plan to continue.

Id. at 722 n.2 (quoting *Pension Plan Termination Insurance Issues: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 95th Cong., 2d Sess. 22 (1978) (statement of Matthew M. Lind)).

creating a potential "race to the exit,"²⁸ which contravened ERISA's primary purpose: to protect the retirement income of employees covered by private pensions.²⁹

The incentive for premature plan termination created a risk that multiemployer plans' funding deficiencies would fall on the PBGC.³⁰ This threat worried Congress because, during the 1970s and early 1980s, many pension plans under ERISA had enormous withdrawal liabilities.³¹ Observers estimate that the PBGC's negative net worth currently amounts to \$2.5 billion and forecast that, absent remedial measures, it will reach \$18

28. See *Central States, Southeast & Southwest Areas Pension Fund v. Koder*, 969 F.2d 451, 452 (7th Cir. 1992); CUMMINGS & KERSHAW, *supra* note 18, at A-1 ("[T]he fear of being among the few left in the final days of a declining multiemployer plan may have caused a 'race to the exit'—generating a self-fulfilling prophecy of plan decline."). Recall that, under the original ERISA provisions, termination liability fell only on employers participating when the plan terminated and on employers that withdrew within five years of plan termination. See *Pension Benefit Guar. Corp. v. R.A. Gray Co.*, 467 U.S. 717, 721 (1984).

29. See *supra* note 12 and accompanying text.

30. To fund the cost of insured benefits, the PBGC first looks to any assets in the underfunded plan. Keating, *supra* note 16, at 807. It funds any shortfall with its own monies, which are derived mainly from premiums charged to employers that maintain ongoing plans. *Id.* (citing 29 U.S.C. §§ 1306, 1344 (1988 & Supp. III 1991)). The federal government incurs no liability for any of the PBGC's obligations. See 29 U.S.C. § 1302(g)(2) (1988). ERISA, however, authorizes the PBGC to borrow up to \$100 million from the U.S. Treasury. Keating, *supra* note 16, at 809 n.30; see 29 U.S.C. § 1305(c) (1988).

Public Law 95-214 mandated a 1978 study to analyze the PBGC's multiemployer plan termination insurance program. GAO REPORT, *supra* note 2, at 3 (citing *Multiemployer Study Required by P.L. 95-214* (1978)). The report concluded that 10% of the existing multiemployer plans, which covered 15% of all participants, suffered financial problems that could lead to plan termination within 10 years. *Id.* The report predicted that, to protect against potential losses, the PBGC would need to increase annual insurance premiums for multiemployer plans from \$0.50 to as much as \$80 per participant. *Id.*

31. Woodrum & McBride, *supra* note 24, at 734 (citing *Pension Benefit Guar. Corp. v. R.A. Gray Co.*, 467 U.S. 717, 721-22, 730 (1984)). Under ERISA's original plan funding rules, large withdrawal liabilities for certain multiemployer plans were not uncommon. *Id.* at 732 n.10. For example, in the early 1980s, the United Mine Workers of America (UMWA) Pension Plans' unfunded liability was so large that employers withdrawing in 1981 and 1982 sometimes incurred withdrawal penalties that were considerably more than their cumulative contributions. *Id.* The amount of withdrawal liability assessed will vary substantially, however, depending on the interest rate used to calculate the plan's unfunded vested benefits. GAO REPORT, *supra* note 2, at 24. Calculations based on a high interest rate produce a relatively low value of vested benefits whereas calculations based on a low interest rate yield a relatively high value for vested benefits. *Id.* Changing the interest rate assumption by as little as one percent can change the calculated value of vested benefits by eight to ten percent. *Id.*

billion before the turn of the century.³² The relatively small number of plans at risk of termination tend to be the most underfunded on a termination basis.³³ In particular, the PBGC calculated that underfunded pension plans in the troubled steel, airline, and automobile industries expose it to billions of dollars in liability.³⁴

B. MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980: THE GENESIS OF WITHDRAWAL LIABILITY

Congress attempted to eliminate the incentive for employers to withdraw from multiemployer plans by enacting MP-PAA.³⁵ MPPAA subjects employers that exit multiemployer

32. Keating, *supra* note 16, at 809 (citing James B. Lockhart, *Securing the Pension Promise*, 43 LAB. L.J. 195, 195-96 (1992)).

33. *Id.* at 813. The GAO estimated that 15.9% of nonconstruction industry plans with 100 or more participants were less than 50% funded for vested benefits. GAO REPORT, *supra* note 2, at 13. The study, which analyzed 1978 data, conceded that it might have overestimated unfunded vested benefits because of the GAO's conservative (i.e., low interest rate) actuarial assumptions. *Id.* at 14. Nonetheless, it concluded that estimates of unfunded vested benefits based on less conservative assumptions would still amount to billions of dollars. *Id.* at vii.

34. Keating, *supra* note 16, at 813. "Of the fifty firms with the largest underfunded pension plans, forty percent of the companies and seventy-five percent of the underfunded amount are concentrated in the troubled steel, automobile and airline industries." *Id.* at 813 (citing Ellin Rosenthal, *PBGC Releases 'Top 50' List*, 50 TAX NOTES 922, 923 (1991)). The PBGC estimates that over half of these fifty are "either probable or possible losses." *Id.* at 813. According to the executive director of the PBGC, the PBGC's exposure "could be as high as \$20 billion to \$30 billion in the event of a major recession that involved a downturn in the steel, automobile, and airline industries." *Id.* at 809 n.30 (citing *Tighter Pension Insurance Rules Urged to Protect Benefits in Reorganizations*, 2 Bankr. L. Rep. (BNA) 328, 330 (Apr. 5, 1990)).

35. See 29 U.S.C. § 1001a(c)(2) (1988) ("It is hereby declared to be the policy of this Act . . . to alleviate certain problems which tend to discourage the maintenance and growth of multiemployer pension plans."); see also H.R. REP. NO. 869, 96th Cong., 2d Sess. 15, reprinted in 1980 U.S.C.C.A.N. 2918, 2919-20, 2935, 2993, 3004 (giving reasons for changing rules for employers' liability); *Pension Benefit Guar. Corp. v. Anthony Co.*, 542 F. Supp. 43, 45 (N.D. Ill. 1982) (noting that withdrawal liability is intended "primarily . . . to prevent premature termination of a plan by an employee's real employer so as to frustrate the employee's reasonable expectations as to pension benefits").

As enacted in 1974, ERISA required the PBGC to pay benefits for single employer plans that terminated with insufficient assets to support their guaranteed benefits. *Pension Benefit Guar. Corp. v. R.A. Gray Co.*, 467 U.S. 717, 720 (1984). The statute, however, made the PBGC's insurance of the benefits promised by multiemployer pension plans discretionary until January 1, 1978, when the PBGC would be required to begin insuring the benefits. *Id.* 467 U.S. at 720. MPPAA superseded the multiemployer pension plan insurance provisions of the 1974 statute. *Id.*

plans to an immediate "withdrawal liability" instead of the previous "termination liability," which was contingent upon the plan lasting less than five years.³⁶ MPPAA imposes mandatory liability on an employer, payable upon withdrawal from a multiemployer pension plan,³⁷ for its pro rata share of the plan's unfunded vested liability regardless of whether the plan later terminates.³⁸

C. APPLICATION OF WITHDRAWAL LIABILITY TO ALL TRADES OR BUSINESSES UNDER COMMON CONTROL

Withdrawal liability under ERISA, as amended, extends to all "trades or businesses . . . under common control," which are jointly and severally liable for the withdrawal penalty incurred by any member of the controlled group.³⁹ In ERISA, as amended, however, Congress failed to define the term "trades or businesses under . . . common control." Instead, Congress instructed the PBGC to promulgate explanatory regulations "consistent and coextensive with" Treasury regulations implementing a similar section of the Code.⁴⁰ The PBGC has promulgated no such regulations.⁴¹ The Treasury regulations to which

36. CUMMINGS & KERSHAW, *supra*, note 18, at A-7.

37. See 29 U.S.C. § 1382 (1988).

38. 29 U.S.C. § 1381 (1988); Central States, Southeast & Southwest Areas Pension Fund v. Personnel, Inc., No. 90 C 1051, 1991 WL 104184, at *2 (N.D. Ill. June 12, 1991), *rev'd*, 974 F.2d 789 (7th Cir. 1992).

For a detailed discussion of how withdrawal liability is calculated, see MICHAEL J. CANAN, QUALIFIED RETIREMENT AND OTHER EMPLOYEE BENEFIT PLANS § 19.21 (1993 ed.).

39. 29 U.S.C. § 1301(b)(1) (1988); Board of Trustees of the W. Conference of Teamsters Pension Trust Fund v. Lafrenz, 837 F.2d 892, 893 (9th Cir. 1988).

40. For example, § 1301(b)(1) of ERISA, as amended, provides as follows:

For purposes of this subchapter, under regulations prescribed by the [PBGC], all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer. The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of [the Internal Revenue Code].

29 U.S.C. § 1301(b) (1988). Section 414(c) states that "all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer." I.R.C. § 414(c) (1988).

41. Central States, Southeast & Southwest Pension Fund v. Personnel, Inc., 974 F.2d 789, 794 (7th Cir. 1992); see also Woodrum & McBride, *supra* note 24, at 738 n.38 ("The PBGC's failure to develop implementing rules which reflect the specific goals and issues relating to withdrawal from a multiemployer plan lies at the very heart of the liability crisis employers now face.").

Congress referred provide some guidance by defining "common control,"⁴² but they do not define "trades or businesses."⁴³

D. DEFINITION OF "COMMON CONTROL"

Under the Treasury regulations promulgated pursuant to section 414(c) of the Code,⁴⁴ the term "two or more trades or businesses under . . . common control" specifically encompasses three types of commonly controlled business groups: parent-subsidiary groups,⁴⁵ brother-sister groups,⁴⁶ and combined groups.⁴⁷ A "controlling interest" of eighty percent ownership links each type of group.⁴⁸

*Pension Benefit Guaranty Corp. v. Ouimet Corp.*⁴⁹ (*Ouimet I*), the seminal case establishing joint and several withdrawal liability for trades or businesses under common control, interprets ERISA's controlled group provisions literally. The First Circuit held that withdrawal liability applies to all members of an employer's controlled group, regardless of whether those members actually participated in "maintaining" the terminated pension plan.⁵⁰ *Ouimet I* establishes that the existence of a con-

42. See *infra* part I.D.

43. See *infra* part I.E.

44. 26 C.F.R. § 1.414(c)-2 (1993).

45. A "parent-subsidiary group" is "one or more chains of organizations conducting trades or businesses connected through ownership of a controlling interest with a common parent organization." 26 C.F.R. § 1.414(c)-2(b) (1993).

46. The regulations define "brother-sister group" as follows:

[T]wo or more organizations conducting trades or businesses if (i) the same five or fewer persons who are individuals, estates, or trusts own (directly and with the application of § 1.414(c)-4 (concerning constructive ownership and attribution of ownership)) a controlling interest in each organization, and (ii) taking into account the ownership of each such person only to the extent such ownership is identical with respect to each such organization, such persons are in effective control of each organization. The five or fewer persons whose ownership is considered for purposes of the controlling interest requirement for each organization must be the same persons whose ownership is considered for purposes of the effective control requirement.

26 C.F.R. § 1.414(c)-2(c) (1993).

47. A "combined group" is a chain of two or more parent-subsidiary and brother-sister groups. See 26 C.F.R. § 1.414(c)-2(d) (1993).

48. See 26 C.F.R. §§ 1.414(c)-2(b) to (d) (1993).

49. 630 F.2d 4, 9-12 (1st Cir. 1980), *cert. denied*, 450 U.S. 914 (1981).

50. *Id.* at 11-12. Although the First Circuit's decision in *Ouimet* predated MPPAA, it remains good law since Congress enacted MPPAA, as Senator Williams, a principal sponsor of ERISA and MPPAA, explained:

Under current law, a group of trades or business under common control, whether or not incorporated, is treated as a single employer for purposes of employer liability under Title IV. Thus, if a terminating single employer plan is maintained by one or more members of a con-

trolled group depends solely on ownership and that the economic interrelation or lack of interrelation between controlled group members does not affect a controlled group's existence.⁵¹ Since *Ouimet*, the courts have decided numerous controlled group cases in a manner consistent with *Ouimet's* literal interpretation of the regulations.⁵²

E. DEFINITION OF "TRADES OR BUSINESSES"

Controlled group liability cases involving disputes over the definition of "trades or businesses" can lead to particularly serious consequences for those with liability at issue. These cases necessarily focus on the activities of unincorporated entities.⁵³ Thus, because unincorporated entities lack the limited liability of corporations, the owners of those entities often face personal liability.⁵⁴

trolled group, the entire group is the "employer" and is responsible for any employer liability. The leading case in this area is *Pension Benefit Guaranty Corporation v. Ouimet Corporation*, 470 F. Supp. 945 (D. Mass. 1979) [affirmed in *Ouimet I*], in which the court correctly held that all members of a controlled group are jointly and severally liable for employer liability imposed under [29 U.S.C. § 1362].

126 CONG. REC. 23,287 (1980).

51. *Ouimet*, 630 F.2d at 11-12.

52. See, e.g., *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227-28 (1986); *Central States, Southeast & Southwest Pension Fund v. Personnel, Inc.*, 974 F.2d 789, 792-93 (7th Cir. 1992); *Board of Trustees of the W. Conference of Teamsters Pension Trust Fund v. Lafrenz*, 837 F.2d 892, 894 n.6, 895 (9th Cir. 1988); *ILGWU Nat'l Retirement Fund v. Minotola Indus.*, No. 88 Civ. 9131 (R.J.W.), 1991 WL 79466, at *4-*5 (S.D.N.Y. May 3, 1991); *Central States, Southeast & Southwest Pension Fund v. Skyland Leasing Co.*, 691 F. Supp. 6, 11-12 (W.D. Mich. 1987), *aff'd mem.*, 892 F.2d 1043 (6th Cir. 1990); *United Food & Commercial Workers Union v. Progressive Supermarkets*, 644 F. Supp. 633, 638 (D. N.J. 1986); *Pension Benefit Guar. Corp. v. Center City Motors, Inc.*, 609 F. Supp. 409, 412 (S.D. Cal. 1984).

53. Few would deny that corporations are trades or businesses.

54. Personal liability arises from a claim against a commonly controlled unincorporated business, not from piercing of the corporate veil. Thus, individuals who hold controlling interests in unincorporated trades or businesses may face personal liability for the withdrawal obligations of a corporation under common control. See, e.g., *Board of Trustees of the W. Conference of Teamsters Pension Trust Fund v. H.F. Johnson, Inc.*, 830 F.2d 1009, 1014-15 (9th Cir. 1987) (establishing that joint venturers may become personally liable for withdrawal liability incurred by a corporation under their common control). Courts generally have refused to extend personal liability to officers or shareholders of corporations withdrawing from multiemployer pension plans absent justification for piercing the corporate veil. See *DeBreceni v. Graf Bros. Leasing, Inc.*, 828 F.2d 877, 880-81 (1st Cir. 1987), *cert. denied*, 484 U.S. 1064 (1988).

When a court "pierces the corporate veil" it disregards corporateness and its attributes, including limited liability. HARRY G. HENN & JOHN R. ALEXANDER, *LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES* 344 (3d ed.

Despite the potentially serious consequences for an individual deemed to operate a trade or business, no clear definition of the term has emerged. Neither the Code nor any Treasury regulations defines "trades or businesses" for general purposes.⁵⁵ Instead, courts have attached various meanings to the term depending on the purpose of the Code section in which the term appears.⁵⁶ In withdrawal liability cases, the courts have repeatedly declared that the term "trades or businesses" must be understood in light of ERISA's purposes.⁵⁷ In the absence of better

1983). As a general rule, courts will not pierce the corporate veil, even with respect to controlling shareholders, when "corporate formalities are substantially observed, initial financing [is] reasonably adequate, and the corporation [is] not formed to evade an existing obligation or a statute or to cheat or to defraud." *Id.* at 347, 352-54.

In *DeBreceni*, the court refused to apply an "economic reality" test, which would allow courts to impose personal liability on one who maintains almost complete control over day to day operations of a corporation. *DeBreceni*, 828 F.2d at 877. The court rejected the pension plan's argument that the public policy embodied in the statute favored imposing personal liability on controlling shareholders of a withdrawing corporation:

[P]ersonal liability would discourage controlling shareholders and officers from directing their corporations to contribute to multi-employer pension plans, thereby making it less likely that their employees will receive pension benefits. In the long run, personal liability would hurt even those employees who are already beneficiaries of multi-employer pension plans, because the vitality of those plans depends on new employers contributing to them.

Id. at 881 (citing H. R. Rep. No. 869, 96th Cong., 2d Sess. 4 (1980), reprinted in 1980 U.S.C.C.A.N. 2918, 2919-20, 2935).

55. The concept . . . has a well-known and almost constant presence on our tax-law terrain. Despite this, the Code has never contained a definition of the words "trade or business" for general application, and no regulation has been issued expounding its meaning for all purposes. Neither has a broadly applicable authoritative judicial definition emerged.

Commissioner v. Groetzinger, 480 U.S. 23, 27 (1987) (footnotes omitted).

56. In *Groetzinger*, the Supreme Court observed that the phrase "trade or business" occurred in more than 50 sections and more than 800 subsections of the tax code and in "hundreds of places in proposed and final income tax regulations." *Id.* at 27. One observer recently estimated that the term appeared in at least 492 subsections of the tax code and in over 644 regulations and noted that over the past 25 years Congress has "increased dramatically" its use of the term. F. Ladson Boyle, *What is a Trade or Business?*, 39 TAX LAW. 737, 737 & n.3 (1986).

57. See, e.g., *Groetzinger*, 480 U.S. at 27 (explaining the need to ascertain the meaning of "trade or business" as it appears in the Code); *Central States, Southeast & Southwest Pension Fund v. Personnel, Inc.*, 974 F.2d 789, 794 (7th Cir. 1992) (recognizing that courts have construed "trade or business" in accordance with Congress' purpose in enacting that section); *Board of Trustees of the W. Conference of Teamsters Pension Trust Fund v. Lafrenz*, 837 F.2d 892, 894 n.6 (9th Cir. 1988) (noting that the definition of "trade or business" is not clearly defined in the Code); *ILGWU Nat'l Retirement Fund v. Minotola Indus.*,

alternatives, however, courts have turned for guidance to interpretations of the Code.⁵⁸

The Eighth Circuit has summarized the types of situations in which courts have found the existence of a trade or business: "vehicle leasing operations conducted for profit; vehicle and real property leases between two entities under common control; and the subsistence of one commonly controlled entity, directly or indirectly, partly or entirely, upon the revenues generated by a second commonly controlled entity."⁵⁹ In three recent cases, the

No. 88 Civ. 9131 (RJV), 1991 WL 79466, at *4-*5 (S.D.N.Y. May 3, 1991) (noting that absent guidance in the statute or regulations about the definition of the term "trade or business," one must "look to the purpose of the section of the statute in which the phrase appears in order to determine whether a particular set of circumstances is encompassed by its intended meaning"); *Central States, Southeast & Southwest Areas Pension Fund v. Lloyd L. Sztanyo Trust*, 693 F. Supp., 531, 536 (E.D. Mich. 1988) (the term "trade or business"—because it is not defined in § 414(c)—should be interpreted in light of intentions of ERISA); *Central States, Southeast & Southwest Pension Fund v. Skyland Leasing Co.*, 691 F. Supp. 6, 11-12 (W.D. Mich. 1987) ("single employer" under 29 U.S.C. § 1301(b)(1) must be interpreted in light of statutory purpose for imposing withdrawal liability), *aff'd mem.*, 892 F.2d 1043 (6th Cir. 1990); *United Food & Commercial Workers Union v. Progressive Supermarkets*, 644 F. Supp. 633, 638 (D.N.J. 1986) ("trade or business" should be interpreted in light of intentions of ERISA); *Pension Benefit Guar. Corp. v. Center City Motors, Inc.*, 609 F. Supp. 409, 411-12 (S.D. Cal. 1984) ("trade or business" must be construed in light of purpose of statute).

58. *Personnel*, 974 F.2d at 796 (citing *Groetzinger*, 480 U.S. at 35). In *Groetzinger*, the leading case interpreting the "trade or business" provisions of I.R.C. § 162(a), the Supreme Court held that a full-time gambler who bets solely for his own benefit engages in a trade or business for the purpose of deducting business expenses. *Groetzinger*, 480 U.S. at 24, 35-36. The Court qualified its holding:

Of course, not every income-producing and profit-making endeavor constitutes a trade or business. The income tax law, almost from the beginning, has distinguished between a business or trade, on the one hand, and "transactions entered into for profit but not connected with . . . business or trade," on the other . . . We accept the fact that to be engaged in a trade or business, the taxpayer must be involved in the activity with continuity and regularity and that the taxpayer's primary purpose for engaging in the activity must be for income or profit. A sporadic activity, a hobby, or an amusement diversion does not qualify.

Id. at 35 (citation omitted). The *Groetzinger* Court concluded that the defendant "pursued [gambling] full time, in good faith, and with regularity, to the production of income for a livelihood, and . . . not [as] a mere hobby." *Id.*

59. *Vaughn v. Sexton*, 975 F.2d 498, 503 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1268 (1993) (citing *Lafrenz*, 837 F.2d at 894-95; *Trustees of the Amalgamated Ins. Fund v. Saltz*, 760 F. Supp. 55, 57-58 (S.D.N.Y. 1991); *Sztanyo Trust*, 693 F. Supp. at 537-38; *Skyland Leasing*, 691 F. Supp. at 12; *Central States, Southeast & Southwest Areas Pension Fund v. Long*, 687 F. Supp. 298, 301 (E.D. Mich. 1987); *Central States, Southeast & Southwest Areas Pension Fund v. Bay*, 684 F. Supp. 483, 485 (E.D. Mich. 1988); *Progressive Supermarkets*, 644 F. Supp. at 639; *Center City Motors*, 609 F. Supp. at 412).

Seventh Circuit held defendants personally liable under a controlled group theory because the defendants were leasing property to a commonly controlled business when the business withdrew from a multiemployer pension plan.⁶⁰ Similarly, the Eighth Circuit recently held that a "Family Trust" that leased real property to a commonly controlled company is a trade or business for purposes of controlled group withdrawal liability.⁶¹

Occasionally, the courts have had to determine whether ownership of assets that are not leased to a commonly controlled business rises to the level of a trade or business. In *Textile Workers Pension Fund v. Oltremare*,⁶² the District Court for the Southern District of New York held that mere ownership of land, even if purchased and held with an intent to develop the land, is not a trade or business. The *Oltremare* court found that "the property ha[d] been nothing more than a personal asset similar to a custody account with a bank."⁶³ Two years later, in *ILGWU National Retirement Fund v. Minotola Industries*,⁶⁴ the

60. *Central States, Southeast & Southwest Areas Pension Fund v. Dittello*, 974 F.2d 887, 890-91 (7th Cir. 1992); *Central States, Southeast & Southwest Areas Pension Fund v. Koder*, 969 F.2d 451, 451-52 (7th Cir. 1992); *Central States, Southeast & Southwest Areas Pension Fund v. Slotky*, 956 F.2d 1369, 1374-75 (7th Cir. 1992).

61. The trust, established in 1980, had leased real property in 1986 and 1987 to a company that withdrew from a multiemployer pension plan. *Vaughn*, 975 F.2d at 503-04. The defendant (as individual and trustee) argued on appeal that the trust's primary purpose was estate planning rather than income-generation, that the trust's income generating activities were not "continuous or regular enough to amount to the acts of a trade or business," and that the income-generating activities had not yet taken place when the withdrawal liability arose. *Id.* at 503.

The trial court held that leasing real property to a company under common control established the existence of a trade or business for withdrawal liability purposes although, as the Eighth Circuit recognized, the trial court did not address the question of when the property leasing had occurred. *Id.* at 502-03. The Eighth Circuit agreed with the plaintiff pension plan that, because the defendant failed to raise the issue of *when* the trust became a trade or business at trial, the defendant was barred from raising it on appeal. *Id.* Thus, the court avoided answering the question whether leasing real estate to a commonly controlled trade or business is economically unrelated to the withdrawing trade or business if the defendant terminates the lease, if the trust owns the property, or, as in *Personnel*, if the employer disposes of the property. *Id.* at 502-04.

62. *Textile Workers Pension Fund v. Oltremare*, 764 F. Supp. 287, 289 (S.D.N.Y. 1989).

63. *Id.*

64. *ILGWU Nat'l Retirement Fund v. Minotola Indus.*, No. 88 Civ. 9131 (RJW), 1991 WL 79466, at *2-*4 (S.D.N.Y. May 3, 1991). In *Minotola*, the defendants, husband and wife, jointly purchased a 300-acre Arkansas farm in 1976 for investment purposes. *Id.* at *2. From 1976 to 1983, they used the land only for "cultivating and marketing its produce." From 1984 to 1991, they

same court held that ownership and leasing of an unincorporated farm is a trade or business for withdrawal liability purposes.

Recently, in *Personnel*, the Seventh Circuit imposed personal liability on the sole shareholder of a personnel leasing corporation because of the shareholder's unrelated real estate ownership. The employer owned and leased an apartment building at the time his corporation withdrew from the plan and had owned and leased various other properties before his corporation withdrew from the plan.⁶⁵

II. *CENTRAL STATES v. PERSONNEL, INC.*

A. PERRELLE'S UNEXPECTED PERSONAL LIABILITY

Eugene Perrelle began operating Personnel, Inc.,⁶⁶ a truck driver leasing company, in 1963 from his home in Kenosha, Wisconsin.⁶⁷ From the start, Personnel operated under collective bargaining agreements that required Perrelle to contribute to the local Teamsters' multiemployer pension plan.⁶⁸ As required by the agreements, Personnel contributed regularly to the union's pension fund in amounts dictated by collective bargaining agreements between the Teamsters and the larger trucking

leased the farm to several individual tenants and received rental income. The farm and Minotola, the defendants' wholly-owned garment manufacturing corporation, were "separate and distinct entities." No Minotola money, equipment, or employees were used for the farm. *Id.* The court explained that "there is no absolute requirement that there be a nexus between the withdrawing entity and the alleged trade or business under common control in order for controlled group liability to be found." *Id.* at *4.

65. *Central States, Southeast & Southwest Pension Fund v. Personnel, Inc.*, 974 F.2d 789, 791-92, 796 (7th Cir. 1992). In *Central States, Southeast and Southwest Areas Pension Fund v. Ditello*, 974 F.2d 887 (7th Cir. 1992), decided one month after *Personnel*, the Seventh Circuit mistakenly claimed that it had encountered its first case in which no economic nexus existed. *Id.*

66. Perrelle was president and sole shareholder of the Wisconsin corporation. *Central States, Southeast & Southwest Areas Pension Fund v. Personnel, Inc.*, No. 90 C 1051, 1991 WL 104184 (N.D. Ill. June 12, 1991), *rev'd*, 974 F.2d 789, 791 (7th Cir. 1992).

67. Brief and Supplemental Appendix of Appellee at 4, *Central States, Southeast & Southwest Areas Pension Fund v. Personnel, Inc.*, 974 F.2d 789 (7th Cir. 1992) (No. 91-2392) [hereinafter *Perrelle Brief*]. As a personnel leasing agency, Personnel did not own or operate trucks, equipment, or garages. *Id.*

68. *Id.* Personnel operated under successive collective bargaining agreements with the Teamsters Local No. 43. *Id.*

firms in Southeastern Wisconsin.⁶⁹ For the first ten years, Perrelle paid himself no salary and no rent.⁷⁰

From 1973 to 1980, Personnel operated from an office in Racine, Wisconsin.⁷¹ Then, in 1980, the corporation moved to a Racine farmhouse owned by Perrelle and began paying rent to Perrelle.⁷² Perrelle worked about sixty to eighty hours a week during the 1970s and early 1980s.⁷³ In the early to mid-1980s, however, Personnel lost business when deregulation increased competitiveness in the trucking industry.⁷⁴ Perrelle worked about forty hours a week during the mid-1980s as the volume of business decreased.⁷⁵

In the fall of 1985, Perrelle moved the company back to his home and stopped paying rent.⁷⁶ The corporation reduced its workforce and its pension fund contributions.⁷⁷ By the summer of 1987, Personnel had ceased operations. The union's pension fund, Central States, Southeast and Southwest Areas Pension Fund ("Central States"), determined that Personnel's reduction in contributions had constituted a "partial withdrawal" on or about December 31, 1986 and assessed Personnel a withdrawal liability of \$283,165.30.⁷⁸

Ineligible to participate in the Teamsters' pension plan,⁷⁹ Perrelle had maintained various long-term investments, including real estate investments, for his family's retirement security.⁸⁰ Perrelle never took capital from Personnel to invest for his

69. *Id.*

70. *Id.* After the first ten years, Perrelle often took only a small salary, less than most of his drivers received. *Id.* at 7. Perrelle's salary from the company never exceeded \$53,000 a year. *Id.*

71. *Id.* at 5. Personnel paid rent to the owner of the building. *Id.*

72. *Id.*

73. *Id.* at 6-7.

74. Central States, Southeast & Southwest Pension Fund v. Personnel, 974 F.2d 789, 791 (7th Cir. 1992).

75. Perrelle Brief, *supra* note 67, at 6-7.

76. *Id.* at 7. Personnel operated out of Perrelle's home rent-free. *Id.*

77. *Personnel*, 974 F.2d at 791.

78. *Id.* Neither Personnel nor Perrelle disputed the withdrawal liability amount. *Id.* at 792.

79. Perrelle Brief, *supra* note 67, at 5. Personnel's collective bargaining agreement with Central States barred Perrelle, as manager of Personnel, from participating in the pension plan. *Id.*

80. *Id.* Perrelle contributed to an individual retirement account and made other long-term investments. *Id.* On the advice of an investment counselor, he invested in some real properties because of the expected long-term appreciation and tax shelter benefits. *Id.* At one time, he owned as many as 10 properties. See Brief of Appellants at 5-7, Central States, Southeast & Southwest Areas Pension Fund v. Personnel, Inc., 974 F.2d 789 (7th Cir. 1992) (No. 91-2392).

own retirement or for other purposes, even upon Personnel's liquidation.⁸¹ When Personnel withdrew from the pension plan in 1986, Perrelle held controlling interests in only two properties: a Sturtevant, Wisconsin apartment building and his Kenosha home.⁸²

B. THE DISTRICT COURT'S ERRONEOUS FOCUS ON ECONOMIC NEXUS

The only issue at trial was whether Perrelle's real estate activities constituted a "trade or business."⁸³ Central States con-

[hereinafter Central States Brief]. During the years preceding and following Personnel's withdrawal from the pension plan, Perrelle held or leased the following properties:

Year	Properties	Activity	Gain	Notes
1984	10	Sold	\$6,461	Held less than one year.
	6	Leased	NA	
1985	1	Sold	\$15,413	Owned six years and leased to Personnel until the sale. Held less than six months.
	3	Bought & Sold	NA	
	5	Leased	NA	
1986	1	Sold	\$6,187	Owned and leased for five years.
	1 (1/2 int.)	Sold	\$5,874	
	1	Leased	NA	
	2 (1/2 int.)	Leased	NA	
1987	1	Leased & Sold	\$50,410	
	2	Leased	NA	

NA: Not available.

See *id.*

81. Perrelle Brief, *supra* note 67, at 6 (explaining the source of Perelle's real estate investment funds).

82. *Id.* at 9. Perrelle purchased the apartment building in 1977. *Id.* He also owned a 50% interest in another apartment building at the time Personnel withdrew from the pension plan. *Id.*

83. Central States, Southeast & Southwest Areas Pension Fund v. Personnel, Inc., No. 90 C 1051, 1991 WL 104184, at *2-*3 (N.D. Ill. June 12, 1991). The court explained that the entities clearly satisfied the "controlling interest" requirement of 26 C.F.R. § 11.414(c)-2(b)(2)(1)(c) and (d) (for a corporation, at least 80% of the voting shares; for a sole proprietorship, complete ownership) and the "effective control" requirement of 26 C.F.R. § 11.414(c)-2(c)(2)(iii) and (iv) (for a corporation, at least 50% of the combined voting power of all the voting stock; for a sole proprietorship, complete ownership). *Id.* at *2.

According to the district court, Central States alleged that Perrelle forfeited his right to contest liability by failing to submit the matter to arbitration in a timely manner pursuant to 29 U.S.C. § 1401(a)(1). *Id.* at *3. The court decided this issue in Personnel's favor, stating that under a "well-settled" exception to the arbitration requirement, a party need not contest withdrawal liability through arbitration if the dispute is over whether a party may be deemed an "employer" within the meaning of 29 U.S.C. § 1301(b)(1). *Id.* In its reply

tended that, as the sole shareholder of a personnel leasing corporation and the sole proprietor of a real estate business, Perrelle operated a "brother-sister" group of businesses.⁸⁴ Perrelle, however, characterized his real estate activity as "purely a personal investment strategy to provide for his retirement."⁸⁵ Personnel argued that, because Perrelle operated only one business, no commonly controlled group of businesses could have existed.⁸⁶

The district court recognized that the term "trade or business" limited, at least somewhat, the scope of activities the controlled group provisions cover⁸⁷ and that determining whether an activity constitutes a trade or business is "essentially [a] factual determination."⁸⁸ Reasoning that no economic nexus connected Perrelle's real estate investments and his truck driver leasing company⁸⁹ and that the investments bore "none of the marks of a business,"⁹⁰ the court held that Perrelle's real estate activities constituted personal investments rather than a trade or business within the meaning of § 1301(b)(1).⁹¹

brief, however, Central States explained that it had merely contended that Perrelle's failure to timely request arbitration waived his right to contest the *amount* of the withdrawal liability. Reply of Appellants, Central States, Southeast & Southwest Areas Pension Fund, *et al.*, at 3-4, Central States, Southeast & Southwest Pension Fund v. Personnel, Inc., 974 F.2d 789 (7th Cir. 1992) (No. 91-2392).

84. *Personnel*, No. 90 C 1051, 1991 WL 104184, at *2 (N.D. Ill. June 12, 1991). Central States bolstered its argument with evidence that Perrelle and his wife deducted on their joint federal income tax return expenses for advertising, utilities, repairs, and depreciation. Central States, Southeast & Southwest Pension Fund v. Personnel, 974 F.2d 789, 794 (7th Cir. 1992).

85. *Personnel*, No. 90 C 1051, 1991 WL 104184, at *3 (N.D. Ill. June 12, 1991).

86. *Id.*

87. The court recognized that "[w]ithdrawal liability under the statute was not intended to encompass every economic activity undertaken by a sole shareholder." *Id.* at *7.

88. *Id.* at *4. The district court observed that the courts have avoided "the application of inflexible rules" to such determinations by holding that "whether an entity may be termed a 'trade or business' is an essentially factual determination." *Id.*

89. *Id.* at *7.

90. *Id.* The district court observed that Perrelle had no customers, employees, office, telephone, or employer identification number associated with his real estate holdings. *Id.* Also, he apparently had not filed a self-employment tax form. *Id.*

91. *Id.* at *5-7.

C. THE SEVENTH CIRCUIT'S REVERSAL: LIMITED CRITERIA FOR
DEFINING TRADE OR BUSINESS

The Seventh Circuit rightly rejected the district court's creation of an economic nexus requirement where the statute did not explicitly impose one.⁹² The court examined Perrelle's real estate holdings over a period of at least four years and found that Perrelle had regularly and continuously invested.⁹³ The court also viewed Perrelle's claim of tax deductions for advertising, utility, repair, and depreciation expenses as "strong evidence" that Perrelle "treated his real estate activities as a business."⁹⁴ Perrelle contended that his real estate holdings did not produce enough income to support him and that, for the most part, he operated at a loss or merely broke even. The court found that Perrelle nonetheless had designed his activities to produce income.⁹⁵ Based on the continuity of Perelle's investment activity, his claim of tax deductions, and his goal of earning a profit, the court concluded that Perrelle's activities rose to the level of a trade or business.⁹⁶

III. THE NEED TO DISTINGUISH PERSONAL
INVESTMENTS FROM TRADES OR BUSINESSES

Personnel's interpretation of the term "trades or businesses" fails to distinguish personal investments from trades or businesses. Under *Personnel*, assets owned primarily for investment purposes become potential avenues to enormous controlled group withdrawal liability. Consequently, employers may avoid participating in multiemployer pension plans, thereby limiting a means for their employees to secure retirement incomes.

92. *Central States, Southeast & Southwest Pension Fund v. Personnel, Inc.*, 974 F.2d 789, 793 (7th Cir. 1992). The court asserted that, in any event, there *was* an economic nexus in *Personnel* because Perrelle had rented an office to *Personnel* from 1980 to 1985. *Id.*

93. *Id.* at 795-96.

94. *Id.* at 795.

95. *Id.* at 796.

96. *Id.* The court stated that it found the *Groetzinger* definition of "trade or business" to be "helpful," even though in *Groetzinger* the Court admittedly had been interpreting a tax code section rather than an ERISA section. *Id.* at 794 (citing *Commissioner v. Groetzinger*, 480 U.S. 23, 35 (1986)).

A. ERISA EVIDENCES AN INTENT TO DIFFERENTIATE BETWEEN INVESTMENTS AND "TRADES OR BUSINESSES"

ERISA leaves the term "trades or businesses . . . under common control" undefined.⁹⁷ In ERISA, however, Congress expressly directed the PBGC to develop new regulations to govern withdrawal liability.⁹⁸ Congress thus intended the PBGC to clarify the definition of the term "trades or businesses . . . under common control" administratively.⁹⁹ In addition, Congress recognized that the courts necessarily would play a role in filling the gaps in the pension statutes and regulations.¹⁰⁰

Congress has provided some direction for interpreting the term "common control." ERISA directs the PBGC to promulgate regulations "consistent and co-extensive with" Treasury regulations that define common control by reference to a precise quantum of overlapping ownership.¹⁰¹ Congress did not provide explicit direction for interpreting the term "trades or businesses." Pre-MPPAA common law "trade or business" doctrine, however, recognizes a distinction, however ill-defined, between a trade or business and an investment.¹⁰² Congress apparently intended to recognize a similar distinction in the withdrawal liability context because it referred to Treasury regulations that recognize the distinction.¹⁰³ To delineate the contours of the distinction between "trades or businesses" and investments, the PBGC and the courts should look to the general purposes of ERISA's controlled group and withdrawal liability provisions.

97. See *supra* notes 39-40 and accompanying text (interpreting trades or businesses under section 1301(b)(1) of ERISA).

98. See *supra* note 40 and accompanying text.

99. See *supra* note 40 and accompanying text.

100. See *Pension Benefit Guar. Corp. v. Anthony Co.*, 542 F. Supp. 43, 44 (N.D. Ill. 1982). The court asserted that "[i]t should be emphasized again that Congress left the shaping—the fine tuning—to the Secretary of the Treasury. It was the experts' job to draft the Regulations in a way that would accomplish the congressional goals without doing violence to reason . . ." *Id.* at 45. Congress "intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans." *Western Conference of Teamsters Pension Trust Fund v. H.F. Johnson, Inc.*, 830 F.2d 1009, 1014 (9th Cir. 1987) (quoting 120 CONG. REC. 29,942 (1974) (statement of Sen. Javits)).

101. See *supra* Part I.D.

102. See *Commissioner v. Groetzinger*, 480 U.S. 23, 28-32 (1986) (summarizing case law interpreting the term "trade or business" in the Code).

103. See *supra* note 40 and accompanying text.

B. ERISA'S CONTROLLED GROUP PROVISIONS WERE INTENDED TO PREVENT EVASION OF LIABILITY THROUGH MANIPULATION OF CORPORATE FORM

When Congress enacted ERISA in 1974, it incorporated the controlled group provisions to prevent employers from evading ERISA's minimum coverage and funding provisions.¹⁰⁴ Controlled group liability treats employees of all commonly controlled business entities as if employed by a single employer.¹⁰⁵ Under the controlled group provisions, employers cannot evade ERISA's requirements by dividing operations into separate units and, for example, providing qualified pension plans only to those units employing the owners, officers, or more highly paid employees;¹⁰⁶ the minimum coverage and funding requirements that apply to the employees of a business entity apply to the employees of all commonly controlled business entities.¹⁰⁷

Congress may have intended the controlled group provisions primarily to ensure fair treatment of employees who are, at least in form, employed by different business entities, but the provisions also tend to protect employees in a more general way. Congress designed the controlled group rules to prevent employers from intentionally promising greater pension benefits than they would be able to supply,¹⁰⁸

104. See S. REP. NO. 383, 93d Cong., 2d Sess. 43 (1974), reprinted in 1974 U.S.C.C.A.N. 4890, 4928; see also H.R. REP. NO. 807, 93d Cong., 2d Sess. 50 (1974), reprinted in 1974 U.S.C.C.A.N. 4670, 4716.

105. The controlled group concept, in the form it takes in ERISA, was first used to prevent abuses in the use of multiple corporate surtax exemptions by related employers. See S. REP. NO. 383, *supra* note 104, at 4928.

106. Woodrum & McBride, *supra* note 24, at 743, 743 n.56 ("Section 235 of the Revenue Act of 1964, Pub. L. No. 88-272, 78 Stat. 19, added Code sections 1561-1563 effective in 1964, limiting opportunities for companies to realize tax saving by merely splitting into multiple corporations.") (quoting H.R. REP. NO. 749, 88th Cong. 2d. Sess. (1963), reprinted in 1964 U.S.C.C.A.N. 1313, 1426).

107. CUMMINGS & KERSHAW, *supra* note 18, at A-7 to A-8.

108. See Pension Benefit Guar. Corp. v. O'Quinn, 711 F.2d 1085, 1092 (1st Cir.) (*O'Quinn II*), cert. denied, 464 U.S. 961 (1983). In *O'Quinn I*, the trial court observed, "[t]he purpose of ERISA is . . . preventing employers from promising more than they can deliver by way of benefits when negotiating collective bargaining agreements. . . . The statute reflects Congress' judgment that, without controlled group liability, businesses could juggle their activities to eviscerate the termination liability provisions of ERISA." Pension Benefit Guar. Corp. v. O'Quinn, 470 F. Supp. 945, 955 (D. Mass. 1976).

In *O'Quinn II*, the First Circuit quoted ERISA's legislative history:

Concern was expressed to the committee that in the absence of appropriate safeguards under an insurance system, an employer might establish or amend a plan to provide substantial benefits with the realization that its funding may be inadequate to pay the benefits called for. Such an employer might, it was argued, rely on the insur-

in response to the "moral hazard" created by the PBGC's insurance.¹⁰⁹

Controlled group liability also safeguards pension benefits simply by maximizing the pool of money available to fund a withdrawal assessment.¹¹⁰ The legislative history of the 1974 statute, however, contains only passing reference to the controlled group mechanism as a method of extending liability.¹¹¹

C. ERISA'S WITHDRAWAL LIABILITY PROVISIONS EMBODY CONFLICTING OBJECTIVES

Congress clearly intended ERISA, as amended, to ensure that workers receive the pension benefits they expect and deserve.¹¹² The statute, however, is complicated, and the various provisions designed to guarantee workers' benefits represent a balancing of competing concerns.

On the one hand, Congress tried to discourage employers from promising their employees greater pension benefits than the employers would be able to provide.¹¹³ An expansive interpretation of the term "trades or businesses" tends to benefit workers by discouraging employers from intentionally promising unrealistically high benefit levels and by maximizing the asset pool available to cover promised pension benefits.

On the other hand, throughout their deliberations, legislators were conscious of the need to avoid unduly burdening businesses.¹¹⁴ Congress recognized that termination liability rules endangered workers' pension benefits by encouraging employers to withdraw from already-precarious plans, discouraging them from entering into existing plans, and discouraging them from

ance as the backup which enables it to be more generous in promising pension benefits to meet labor demands than would be the case if it knew that the benefits would have to be paid for entirely out of the assets of the employer.

711 F.2d at 1092 (quoting S. REP. NO. 383, 93d Cong. 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4890, 4971).

109. For a detailed discussion of the moral hazard problem attending the PBGC's insurance system, see Daniel Keating, *Pension Insurance, Bankruptcy and Moral Hazard*, 1991 WIS. L. REV. 65 (1991) (arguing that the PBGC is poorly equipped to monitor pension funding).

110. If any of a withdrawing employer's controlled group members are going concerns at the time of the withdrawal, controlled group liability increases the pool of money available to fund the withdrawal assessment.

111. See H.R. REP. NO. 1280, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5155.

112. See *supra* note 12 and accompanying text.

113. See *supra* note 108 and accompanying text.

114. See *supra* note 27.

forming new plans.¹¹⁵ By replacing termination liability with withdrawal liability, MPPAA reduces the incentive for participating employers to withdraw from multiemployer plans. Evidence suggests, however, that MPPAA rules also deter new employers from entering the plans.¹¹⁶ A narrower interpretation of the term "trades or businesses" tends to accomplish the objective of limiting the burden on employers.

D. COURTS HAVE USED BROADER ANALYSES TO CLASSIFY ASSETS UNDER FEDERAL INCOME TAX LAWS

Commissioner v. Groetzinger,¹¹⁷ which the Seventh Circuit found "helpful" in its *Personnel* analysis,¹¹⁸ identifies two main requirements for an activity to constitute a trade or business for purposes of business deductions: the activity must be conducted for profit, rather than for recreation, and the activity must be conducted with continuity and regularity.¹¹⁹ In holding that a full-time gambler conducted a trade or business, the *Groetzinger* Court recognized that these two factors were not always exhaustive but did not identify other factors that the courts ought to consider.¹²⁰ Moreover, although the Court recognized that managing and preserving one's assets is not a trade or business

115. See *supra* notes 27-28 and accompanying text.

116. CUMMINGS & KERSHAW, *supra* note 18, at A-7. No multiemployer pension plans have been created in the United States since 1980. See J. Daniel Plants, Note, *Employer Recapture of ERISA Contributions Made by Mistake: A Federal Common Law Remedy To Prevent Unjust Enrichment*, 89 MICH. L. REV. 2000, 2034 & n.217 (1991) (citing *Employee Pension Protection: Hearings on H.R. 1661 Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 101st Cong., 1st Sess. 14 (1989) (testimony of Rep. Erlenborn)). Thousands of multiemployer pension plans, however, terminated during the 1980s. See *Employee Pension Protection Act of 1989: Hearings on S. 685 Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources*, 101st Cong., 2d Sess. 1 (1989) (comment of Chairman Metzenbaum).

The General Accounting Office (GAO) has been unable to determine the extent to which withdrawal liability has deterred entry of new employers into multiemployer plans. GAO REPORT, *supra* note 2, at 16. According to the GAO, pension plan officials representing plans in declining industries, which had experienced no growth rate before MPPAA, generally did not expect new employers to enter into their plans. *Id.* Officials representing plans with growth potential, however, generally believed that MPPAA's creation of withdrawal liability would discourage new employers from entering their plans. *Id.*

117. 480 U.S. 23 (1987).

118. See *supra* note 96.

119. *Groetzinger*, 480 U.S. at 35; see also DANIEL M. SHAVIRO, PASSIVE LOSS RULES at A-34 (BNA Tax Mgmt. Portfolio No. 454-2d, 1993) (discussing the two requirements for an activity to constitute a trade).

120. *Groetzinger*, 480 U.S. at 36.

under the business deduction provision, it did not specify how the activity of managing and preserving one's assets ought to be distinguished from the operation of a trade or business.¹²¹

In relying on the *Groetzinger* analysis, the Seventh Circuit overlooked other contexts in which courts distinguish trades or businesses from investments under federal income tax law. For example, to determine whether a taxpayer holds property as a mere investment or, rather, acts as a dealer by holding property "primarily for sale" in the ordinary course of a trade or business for purposes of defining capital assets,¹²² courts have engaged in a multifactorial analysis,¹²³ yielding a host of highly fact-dependent judicial decisions.¹²⁴ Also, federal tax law generally treats

121. The Supreme Court accepted the holding of *Higgins v. Commissioner*, 312 U.S. 212 (1941), "that managing and preserving investment assets is not a trade or business activity even if engaged in for profit and on a full-time basis." SHAVIRO, *supra* note 119, at A-34.

122. See 26 U.S.C. § 1221(1) (1988) (excluding from capital assets "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business").

123. The courts have considered:

(1) the frequency, number, and continuity of the sales; (2) subdivision, platting, and other improvements or developments tending to make the property more marketable; (3) the extent to which the taxpayer engaged in sales activity; (4) the length of time the property has been held; (5) the substantiality of the income derived from the sales, and what percentage that is of the taxpayer's total income; (6) the nature of the taxpayer's business; (7) the taxpayer's purpose in acquiring and holding the property; (8) the extent of sales promotional activity such as advertising; and (9) the listing of property for sale directly or through brokers.

Gault v. Commissioner, 332 F.2d 94 (2d Cir. 1964) (citing *Kaltreider v. Commissioner*, 255 F.2d 833, 838 (3d Cir. 1958)). "It is difficult to attach an absolute or specific degree of importance to the particular factors involved, and in part the weight of any one factor has depended on the combination of others with which it occurred." *Id.* at 96 (citing MERTENS LAW OF FEDERAL INCOME TAXATION § 22.138 n.69, 623-34 (Zimet & Weiss Rev.); see also *Friend v. Commissioner*, 198 F.2d 285, 287 (10th Cir. 1952).

124. See, e.g., *Gault*, 332 F.2d at 95 ("Because there is a good deal of overlapping between business and investment property in this area, the cases are legion."); *Kelley v. Commissioner*, 281 F.2d 527, 528 (9th Cir. 1960) ("Indeed, the case law has grown to a jungle-like abundance accompanied by much of the welter and impenetrability which such fertility produces."); *Biedenharn Realty Co. v. United States*, 356 F. Supp. 1331, 1331 (D. La. 1973) ("the 'old, familiar, recurring, vexing and oftentimes elusive' problem" of distinguishing capital gains from ordinary income), *aff'd*, 509 F.2d 171 (5th Cir.), and *reh'g*, 526 F.2d 409 (5th Cir.) (en banc), and *cert. denied*, 429 U.S. 819 (1975); see also Stanley S. Surrey, *Definitional Problems in Capital Gains Taxation*, 69 HARV. L. REV. 985 (1956); Stanley Weithorn, *Subdivisions of Real Estate—"Dealer" v. "Investor" Problem*, 11 TAX L. REV. 157 (1956).

rental activity as a "passive" activity rather than a trade or business for purpose of loss deductions.¹²⁵

The Seventh Circuit should have looked beyond the *Groetzinger* analysis and considered factors that the courts have developed for examining capital gains and passive loss claims. That is, it should have looked beyond Perelle's profit motive and the continuity of his activity and considered such factors as the following: frequency of sales, improvements to the property, the extent to which the property owner engaged in sales and promotional activity, the percentage of the taxpayer's total income derived from the activity, the nature of the taxpayer's business, the taxpayer's purpose in acquiring and holding the property, and the use of brokers for selling the property. Such an analysis recognizes the limitations of the *Groetzinger* approach in distinguishing between operation of a trade or business and management of one's investments. Both activities usually will be conducted regularly and continuously, and both may yield profits. A broader analysis more closely reflects the purpose of an individual's real estate ownership and of ERISA's controlled group withdrawal liability provisions. Under this broader analysis, Perelle probably would not be characterized as the proprietor of a real estate trade or business.

E. *PERSONNEL* MAY DISCOURAGE EMPLOYERS FROM PARTICIPATING IN MULTIEMPLOYER PENSION PLANS

Certainly employers who are aware of the Seventh Circuit's interpretation of the controlled group provisions can plan their personal finances accordingly. Although *Personnel's* outcome would likely surprise the average small business owner, business owners may avoid personal controlled group liability by avoiding ownership of real estate or by owning a stake in real estate that has been incorporated. Many business owners, however, will likely want to continue to hold real estate among their investments. Investors, both small and large, commonly include real estate in their portfolios.¹²⁶ They should be able to do so

125. Treas. Reg. § 1.469-1T(e)(ii) (West 1990). Rental activity may be a trade or business activity, "if the rental operations are treated as incidental under the '80-20' rule of Regs. § 1.469-4T(d)(2)." SHAVIRO, *supra* note 119, at A-33 n.346.

126. Investors often invest part of their portfolios in real estate as a hedge against inflation. Traditionally, real estate has performed well in inflationary times, whereas stocks and bonds historically have declined when interest rates rise. Peggie R. Elgin, *Real Estate Slump Burns Pension Funds, Offers Opportunities*, 12 CORP. CASHFLOW, Apr. 1991, at 7. Real estate investments can help

without having to incorporate these assets.¹²⁷ Moreover, incorporation will not shield an individual who holds all shares of the incorporated asset from controlled group liability. Thus, business owners may choose to avoid the risk of an unfavorable withdrawal liability determination by avoiding participation in multiemployer plans. This result contravenes ERISA's avowed purpose.

Some argue that controlled group liability merely constitutes a business risk and that employers can decrease the likelihood of incurring substantial withdrawal liability by adequately capitalizing their employees' pension plans.¹²⁸ Often, however, individual employers have little or no control over the extent to which their employees' plans are funded.¹²⁹ Small family businesses operating under regional or national wage agreements typify many of the industries in which multiemployer plans are commonplace.¹³⁰ These businesses have little control over the terms of the labor agreements under which they begin operations.¹³¹ In addition, individual employers often have no power to influence collectively bargained future benefit increases, which increase a plan's vested liabilities and therefore increase

increase investment return while reducing overall portfolio risk. Michael Sivy, *How You Can Make Money in 1992*, MONEY, 1991 (Special Year-End Edition) at 50.

127. Real estate activities traditionally have been conducted in unincorporated form. KAREN C. BURKE, FEDERAL INCOME TAXATION OF PARTNERS AND PARTNERSHIPS IN A NUTSHELL 35 (1992).

128. See, e.g., Israel Goldowitz & Thomas S. Gigot, *The Controlled Group Rule for Purposes of the Withdrawal Liability Provisions of the Employee Retirement Income Security Act*, 90 W. VA. L. REV. 773, 789 (1988) ("Such potential liability is but one cost of doing business, and nothing prevents such a participating business from preparing, through adequate capitalization, for the possibility of incurring withdrawal liability.").

129. See, e.g., Woodrum & McBride, *supra* note 24, at 751-53. Unionized coal industry employers, for example, operate subject to a uniform national labor agreement bargained between the United Mine Workers of America and the Bituminous Coal Operators' Association (BCOA). BCOA members account for a majority of all production under the labor agreement but comprise only a small percentage of the employers (130 of 2000 signatory employers in 1981) signatory to the agreement. *Id.* at 751. Independent producers were "expected and, if necessary, compelled to follow the pattern" of the labor agreement. *Id.* (quoting C. PERRY, COLLECTIVE BARGAINING AND THE DECLINE OF THE UNITED MINE WORKERS 162 (U. of Pa. Industrial Res. Unit No. 60, 1984)).

130. See *supra* note 129.

131. Collective bargaining agreements govern the level of pension benefits to which employees are entitled as well as the size of the contributions participating employers are required to make to fund the plan. See *infra* note 129 and accompanying text.

the employers' financial exposure.¹³² Even employers that, like Personnel, pay all plan contributions required by their collectively-bargained agreements can become liable for large amounts of unfunded vested benefits.

F. AN EXPANSIVE DEFINITION OF TRADES OR BUSINESSES FAILS TO ADDRESS MULTIEMPLOYER PLANS' SERIOUS FUNDING PROBLEMS

The Seventh Circuit's interpretation of ERISA's "trades or businesses" language places the risk of severe and unanticipated financial burdens on individuals and their families, while failing to address the underlying problems that create pension plan underfunding. Scholars offer three reasons for the PBGC's massive deficit: the PBGC's "shoddy enforcement" practices,¹³³ a statutory design that allows employers too much discretion to determine their annual minimum funding obligations, and the PBGC's insurance of "past service liability."¹³⁴ They cite the third reason, the PBGC's insurance of "past service liability,"¹³⁵ as the largest cause of the PBGC's projected deficits.¹³⁶ Thus,

132. Future benefit increases may increase an employer's financial exposure by requiring an increase in the level of ongoing contributions and by increasing the level of unfunded vested benefits. The greater the unfunded vested benefits, the greater a multiemployer pension plan's withdrawal liability.

133. Examples of inadequate enforcement include lax monitoring, overly liberal granting of minimum funding waivers, and tardiness in terminating underfunded plans. Keating, *supra* note 16, at 809-10.

134. *Id.* at 810-811.

135. Past service liability is the employer's funding liability for benefits based on the years an employee worked before the plan was established. *Id.* at 811.

136. *Id.* at 811-12 (citing 26 U.S.C. § 412(b)(2)(B)(ii) (1988), which provides for the past services of employees to be credited when a new plan is established); see CONGRESSIONAL BUDGET OFFICE, FEDERAL INSURANCE OF PRIVATE PENSION BENEFITS xv (1987) (asserting that the government's own rules, rather than noncompliance by a plan sponsor, are often the source of a plan's underfunding); see also RICHARD A. IPPOLITO, THE ECONOMICS OF PENSION INSURANCE (1989) (arguing that main cause of pension plan underfunding is coverage of past service benefits).

Multiemployer pension plans may amortize contributions for one component of vested benefits, past service benefits, over a 30 or 40 year period, depending in part on the date the plan was established. See 29 U.S.C. § 1382(b) (1988); Keating, *supra* note 16, at 809-10; CUMMINGS & KERSHAW, *supra* note 18, at A-2 to A-3. Because a multiemployer plan may amortize past service benefits over several decades, a plan's unfunded vested benefits (and therefore its withdrawal liability) may be very high during the early years of a plan. Keating, *supra* note 16, at 811-12. Thus, a pension plan may be fully funded on an "ongoing basis" but underfunded on a "termination basis." *Id.* at 812. Indeed, because employers may amortize past service costs over a thirty year pe-

the Seventh Circuit's interpretation tends to discourage employer participation in multiemployer plans, but provides no assurance that pension plans will recover enough assets to fund vested employee benefits.

CONCLUSION

MPPAA's language and construction suggest that Congress intended to create a distinction between "trades or businesses" and investments for purposes of imposing controlled group withdrawal liability. Such a distinction balances competing objectives: it advances the overarching legislative intent of safeguarding employees' retirement incomes by encouraging full funding of employees' vested benefits without creating requirements so burdensome that employers refuse to participate in guaranteed pension plans. Although Congress directed the PBGC to promulgate regulations to implement MPPAA's controlled group withdrawal provisions, attempting to fashion regulations that define the elusive concept of "trades or businesses" may prove to be of little use. As the district court observed in *Personnel*, determining whether an activity constitutes a trade or business is "essentially [a] factual determination."¹³⁷ Courts should carefully examine the facts of the cases and draw the line between "trades or businesses" and investments in such a way that the choice of investments like real estate over other investment vehicles like stocks or bonds does not determine the imposition of personal liability.

Central States v. Personnel, Inc. sets an unreasonably low threshold of activity for a real estate trade or business. In drawing the line between investments and "trades or businesses," the courts should consider the principles governing the identification of capital assets for capital gains purposes. Most importantly, the courts should clearly articulate factors that allow individuals to determine on which side of the line their real estate activities fall.

riod, a plan's past service liability will rarely be fully funded at the time of plan termination. *Id.*

137. The district court observed that the courts have avoided "the application of inflexible rules" to such determinations by holding that "whether an entity may be termed a 'trade or business' is an essentially factual determination." *Central States, Southeast & Southwest Areas Pension Fund v. Personnel, Inc.*, No. 90 C 1051, 1991 WL 104184, at *4 (N.D. Ill. June 12, 1991).

